The Solicitors' Journal

VOL. LXXXVIII. **Saturday, January 1, 1944.** No. 1

Editorial, Publishing and Advertisement Offices: 29–31, Breams Buildings, London, E.C.4. Telephone: Holborn 1403.
SUBSCRIPTIONS: Orders may be sent to any newsagent in town or country, or, if preferred, direct to the above address.
Annual Subscription: £3, *post free*, payable yearly, half-yearly, or quarterly, in advance. *Single Copy:* 1s. 4d., *post free.*

Current Topics.

Mr. Justice Bennett.

LAWYERS who are familiar with the work of the High Court were shocked to hear of the sudden death last week of Mr. Justice BENNETT, at the age of sixty-six. The late judge's geniality and courteousness of manner endeared him to all who practised before him, and his balanced and learned judgments earned him the respect of both the bar and the bench. Latterly he served from time to time as a judge in the Court of Appeal. Sir CHARLES ALAN BENNETT was educated at Winchester and Lincoln's Inn, where he was called to the Bar in 1900. In the last war he served in the Rifle Brigade and was taken prisoner by the Germans. In 1923 he took silk and in 1928 he was made a Bencher of his Inn. A year later he was promoted to the bench. Mr. Justice BENNETT was, in his way, an ideal judge, hating cant and humbug, not without humour, and with a strong desire to do justice, overriding, where necessary, the mere letter of the law. He will be remembered for his patient hearing of *Bradford Third Equitable Benefit Building Society* v. *Borders* [1938] Ch. 520; 83 SOL. J. 154, which led to the passing of the Building Socicties Act, 1939. More recently, he decided, in *Re D (Infants)* [1943] 112 L.J. Ch. 237; 87 SOL. J. 290, that the Chancery Division has jurisdiction, although an infant has no property of his own, to appoint a guardian of his person even though he is a foreign subject. A Bill is at present before Parliament dealing with this matter. His passing will mean a great loss to the bench.

Women in the Legal Profession.

SINCE the admission of women to both branches of the legal profession, their advance, though slow and unspectacular, has been steady. We are now accustomed to seeing women advocates arguing with equal ability to that of men in the police and county courts, attending completions and doing all the other legal work which was once the exclusive prerogative of the male sex. At the bar a number of women have attained substantial practices not only in specialised branches of work, but in subjects not solely requiring a "woman's point of view." It is now no wild flight of the imagination to envisage the appointment of women county court and High Court judges and women "lords justices" of appeal. The difference, if any, between feminine "intuition" and masculine logic does not seem to count for much in the courts or in the office. The most essential qualities of a lawyer—common sense, knowledge of human nature and the powers of forcible expression and of holding one's own in an argument—are far from lacking in the so-called gentler sex. Woman is no longer merely "one of nature's agreeable blunders," as a distinguished woman dramatist once said, but a partner who, to quote an even greater dramatist, "dare to do all that may become a man," and do it at least as well. A recent appointment gives added proof of this fact. Solicitors will extend their sincere congratulations to Miss MARY HOLLOWELL, one of their number, who has attained the distinction of being the first woman clerk to the magistrates to be appointed. Miss HOLLOWELL was admitted in 1936 and has acted for some years as deputy clerk to the Needham Market Bench. Her new appointment is as clerk to the Stowmarket justices in Suffolk and we wish her many years of happy and useful service.

Art and Ethics of Advocacy.

SOME time ago we made a brief reference to the Haldane Memorial Lecture, 1943, delivered by Sir GERVAISE RENTOUL, K.C. (Metropolitan Magistrate for West London), on 3rd June, 1943), at Birkbeck College. Readers will be pleased to know that the lecture has now been published by Birkbeck College and the wise and witty advice of the learned magistrate to aspiring advocates may be studied at greater leisure. A limited number of copies of the lecture are available free of charge from THE SOLICITORS' JOURNAL. Many young lawyers will wish to take to heart the suggestion that, as a start, one of the most important of the essential elements of the fascinating art of advocacy is an insight into psychology, for the purpose of understanding the judge as well as witnesses. Of course, text-book learning will not provide this insight, and Sir GERVAISE RENTOUL hints that experience is the best method of obtaining it, for the advocate "must try in his own mind to put himself in the position of the judge." Experienced advocates will agree that most judges "owe a great deal to the advocate who practises before them" and that "many of the best judgments are but reasoned and authoritative summaries of the cogent arguments that have been addressed to the court." Emphasis on orderly presentation of facts is laid by the saying "I'm not arguing; I'm telling you," which shows, as the lecturer hinted, that the judge "is predisposed to accept as sound what is well ordered." Calmness, coolness and good humour, also receive their due emphasis. Sir GERVAISE considers that "to get at the truth by a series of skilfully framed questions is a task demanding the keenest intellectual qualities." From the context, it is clear that Sir GERVAISE was referring to the art of cross-examination; in this he differs from the opinion expressed by the late MAURICE HEALY, in his book "The Old Munster Circuit," where he rated examination-in-chief as a much more exacting art. As to the ethics of advocacy, Sir GERVAISE quoted some well-known dicta and a few less well known. There was that uttered by COCKBURN, C.J.: "It is his duty to strive to accomplish the interests of his client *per fas* and not *per nefas*." LORD ELDON put it in another way: "He is merely assisting in the administration of justice and acting under the impression that the truth is best discovered by powerful statements on both sides of the question." Advocates, both young and old, cannot be otherwise than enriched by a perusal of this lecture.

Incomes for Wives.

A NEW scheme, devised by LADY RHYS WILLIAMS, proposes that social security benefits for dependents should be combined with income tax allowances so that every housewife should be provided with an income of her own. It is pointed out in the scheme that income tax rebates at present constitute a system of real allowances for dependents whereby the well-to-do receive 10s. a week for a child to which allowances of 5s. a week for each child except the first are later added. Those whose incomes are below the taxable limit receive only the 5s. allowances. The scheme proposes that the provision of allowances for dependents in any new social security scheme should include a continuous wife's allowance, and that all dependents' allowances for both children and adults, and all pensions, should be wholly financed through income tax, so as to save unnecessary duplication of administrative machinery. Unemployment and disability benefits, however, it is stated, should be wholly financed through a social insurance scheme. This would preserve the social insurance disciplines necessary to prevent large-scale absenteeism and malingering, without imposing economic penalties on housewives and children. Income tax, it is suggested, should be levied at a single flat rate upon all incomes above a low minimum, and positive dependents' allowances, instead of rebates, would be made at standard rates for the whole population. Assuming a total taxable post-war national income a little less than in 1942, the whole cost of the scheme, including the cost of existing social services, and two-thirds of the cost of comprehensive free medical services, could, it is estimated, be met by a flat rate tax of 7s. in the £ on all incomes over £148 a year, and there would be left over £40,000,000 a year for education and £100,000,000 towards interest on the national debt. The benefits would include £1 a week for every housewife or unpaid relative or friend acting as housekeeper. All the other social security benefits would be provided for by the scheme, and it is pointed out that a married man with two children earning £3 a week would receive an additional 38s. a week when in work, and £3 a week when unemployed or sick. The proposal that housewives should be paid for their services is but one of a number of social security proposals. Whether its accomplishment would either elevate the status of married women or make them feel economically more secure may well be a matter of future debate. There are, however,

many who still believe that the legal position disclosed by *Blackwell* v. *Blackwell and Another* (87 SOL. J. 394), which leaves parties to a marriage to make their own arrangements as to the allocation of earnings, is not urgently in need of reform.

A Requisitioning Point.

A DETAILED report of an interesting case before the General Claims Tribunal on 20th and 21st October, 1943, appeared in the *Estates Gazette* of 18th December, 1943. The only issue for the tribunal was whether, in the case of a farm known as Lower Hockley, the rent as defined by the Act was £11 10s. as shown in the claim or whether it should be £27 15s. 6d. as contended by the authority, and in the case of Plumberow Estate £51 as claimed or £11 12s. as contended by the authority. The claimant, an estate agent, acquired the Lower Hockley Farm in September, 1939, when a letting for grazing for dairy purposes terminated. From September, 1939, until March, 1942, the land was let at £71 10s. a year, the tenant undertaking to keep hedges and ditches in repair and to pay rates, taxes and all outgoings, excepting land tax, tithe and Sched. A. Acres taken over for ploughing numbered 19·1, and the remaining land, amounting to 31·7 acres, were taken over by the Ministry in March, 1942. The claimant had acquired Plumberow some twenty years ago and out of 350 acres he had sold about 300 acres for building plots by 1939. In 1938 he had let the rights for feeding and cutting grass at a rent of £4 a year, as the land was sour and in a generally bad condition. It was argued for the authority that Defence Reg. 62 gave the Minister wide and autocratic powers to direct anybody to cultivate, manage or use his land, as the Minister thought fit, and these powers were delegated to the local War Agricultural Committees. There was also power in the committee to go upon the land and do the work themselves and to recover the cost from the occupier who had defaulted. They also had power to take possession of the land. Anyone contemplating taking possession of land on the Plumberow Estate as tenant would have to consider his possible liability for expenditure as a result of ploughing orders made or to be made. The value of that land, subject to a ploughing order, might be £4 at a generous estimate, or even nil. In regard to the Lower Hockley Farm, something fell to be deducted because it was clear that, even apart from a ploughing order, anybody keeping cattle in war-time had to take steps to provide themselves with foodstuffs which would necessitate some ploughing. Some interest might be deducted in respect of that capital expenditure and something for cultivation and equipment costs. In reply it was contended that it was wrong to say that one took land with a ploughing-up order attached to it. The hypothetical case was that of a landlord free to let and a tenant free to take. In the result the tribunal awarded compensation under s. 2 (1) (*a*) of the Compensation (Defence) Act, 1939, at the rate of £60 per annum in the case of Lower Hockley Hall and at the rate of £11 12s. 6d. per annum in the case of Plumberow. No order was made as to costs.

Welsh in the Courts.

LONG before the Welsh Courts Act of 1942 it had been the practice in Welsh Courts, in spite of the Statute of Henry VIII prescribing the use of Welsh in the courts, to allow witnesses to give their evidence in Welsh provided that they could satisfy the court that that was the language in which they naturally thought and spoke, whether or not they spoke English. That statute of 1536, although a dead letter, was repealed by the Welsh Courts Act, 1942, which declared that Welsh must be used in any court by any party or witness who considered that he might otherwise be at a disadvantage by reason of his actual language of communication being Welsh. Under the Act any part of the proceedings rendered in Welsh must be translated, unless the court is satisfied that such translation is not necessary for securing the due and proper public administration of justice. During the hearing of a minor charge of wilful damage at Barmouth on 19th November, the defending solicitor, Mr. T. R. JONES, who is clerk to the Bala Bench of Magistrates, said that a police officer had taken down the statement of a defendant in English although the defendant had spoken in Welsh throughout. Why (asked Mr. JONES) was the statement not written in Welsh in the exact words of the defendant? The police officer informed the bench that it was customary to draw out all police reports in English and, as they were usually submitted in that language in the police courts, he had written the statement in English to save time. Mr. JONES said that he believed every person should have every right to have his statement recorded in the language in which it was given. He personally had had a wide experience as an interpreter at various courts and fully realised the difficulties in translating from Welsh to English to convey the exact meaning of the words uttered. It was important, he said, that statements given in Welsh should be taken in Welsh and given publicity in the police courts in that language. That principle should be upheld without question, for otherwise it would mean that justice would be at the mercy of the officer translating the statement and that would be grossly unfair and unjust. Those who supported and carried through the Welsh Courts legislation will be interested in Mr. JONES' emphatic statement. There is definitely a case for clear instructions being given to the police on this fundamental matter of common justice.

Plain English.

A DOCUMENT from the Ministry of Health which was put before His Honour Judge ALLCHIN at Edmonton County Court recently, read as follows: "Whereas the premises wherewith particulars are set out on the schedule hereto attached are in possession of the Ministry of Health by virtue of Regulation 51 of the Defence (General) Regulations, 1939, and the Council of the Borough of Southgate, are, under authority of that Minister, using the said premises for the purpose authorised by the said regulations: now, therefore, the Minister, being of opinion that it is expedient in connection with such use of the said premises so to do, hereby authorises the Council to do, in relation to the said premises, all such acts, including taking of any legal proceedings, as a person having an interest in the premises by virtue of which he is immediately entitled to possession thereof, would, by virtue of that interest, be entitled to do for the purpose of securing the removal from the said premises of persons not entitled to occupy the same. Given under official seal of the Ministry of Health." The case before the court was one in which the Southgate Borough Council applied for and were granted a possession order in fourteen days and judgment for £30 arrears of rent against their food executive officer and national registration officer. The comment of the learned judge was "What a rigmarole." He said that the words after "now therefore" merely meant that the Council was authorised to recover possession of the premises. We respectfully agree with the learned judge's comment, and so, we think, will all lawyers of experience. This is like the work of the old Circumlocution Officer, which should have vanished long ago. Since this war began departments of State have been requested to use simpler language. It is sad to think that there are still some corners in our otherwise respected Ministry of Health which still contain the cobwebs of what is wrongly imagined to be legal language.

Agricultural Reconstruction.

A BOOKLET recently published by the Land Union devotes itself to the task of offering solutions for the "more domestic problems of the countryside—problems such as the provision of cottages, the maintenance of farm buildings, the improvement of water supplies and the installation of electrical services." Its object, according to the foreword, is "to show, specifically and precisely, in what ways the agricultural landowner can help in the maintenance of the land and its equipment." The opinion is expressed that assistance to the land can best be administered through the landlord and tenant system, "which has proved its worth in this war as in the last and has brought agriculture through the lamentable depression of the last hundred years." The fact that between 11th November, 1918, and 31st July, 1939, only 141,886 houses were built by rural district councils is used in the booklet as an argument in favour of private as opposed to public ownership of land and as indicating "the need for enlisting the help of those who have in the past provided houses in plenty for the agricultural workers—the private landowners." In the absence of figures it is impossible to verify this statement of the record of private landowners, but any suggestions for the purpose of stimulating landowners to take part in the provision of houses for rural workers merit consideration. The suggestion put forward in the booklet is that the Housing (Rural Workers) Acts, 1926 to 1938, the Housing Act, 1936, and the Housing (Financial Provisions) Act, 1938, should be so amended and extended that the private landowner will be enabled to build all the houses that may be required for agricultural workers." The recommendations are briefly (1) that the Government should without delay define the housing standard which will be required after the war, (2) the Housing (Rural Workers) Acts should be extended and amended so that (*a*) the limit of value of a house in respect of which assistance may be given should be increased to £800, and (*b*) the amount of grant per house should be increased to £200, and, in cases where an additional grant is made to relieve overcrowding, the total should be £300; (3) amending legislation should be introduced giving power to the Minister of Health to enforce the performance by county councils or where the rural district council is the authority, by rural district councils of their powers under the Act; (4) the grants to persons other than local authorities who provide houses for the agricultural population should be increased. The booklet also covers such diverse subjects as rating, drainage, water supply, electricity, land drainage, agricultural holdings, soil fertility, grouping of farms, forestry and taxation. It represents a careful examination of the problems involved, with an obvious bias in favour of the private landowner, and it should be studied by all who are interested in agricultural problems.

Recent Decision.

In a case before the Divisional Court (the LORD CHIEF JUSTICE, MACNAGHTEN and ATKINSON, JJ.) on 21st December (*The Times*, 22nd December), it was held that a factory canteen provided for the exclusive use of 2,000 employees of a factory, but situated on a plot of land 260 yards from the factory, was used as a factory or workshop as defined by s. 149 (4) of the Factory and Workshops Act, 1901, and was therefore an industrial hereditament within the Rating and Valuation (Apportionment) Act, 1928, so as to be entitled to the benefit of derating.

Solicitors' Advances to Clients.

Income Tax in relation to Bad Debts.

THERE can be few solicitors who, in the ordinary course of their business, do not make advances to their clients, whether as definite loans at interest or as payments on account, and in anticipation, of income which the solicitor is instructed to collect on the client's behalf. Inevitably some such advances ultimately prove irrecoverable, and in these instances it has been the consistent practice of the Inland Revenue to refuse relief for income tax purposes in respect of the bad debts so incurred. This practice has derived from the decisions of the House of Lords in *Commissioners of Inland Revenue* v. *Hagart & Burn-Murdoch* (1929), 14 T.C. 433, and the Court of Session in *W. A. and F. Rutherford* v. *Commissioners of Inland Revenue* (1939), 23 T.C. 8.

A recent appeal to the General Commissioners by Messrs. Elvy Robb & Co. (reported in the November, 1943, issue of *The Law Society's Gazette*) has produced a result much more favourable to the taxpayer, and may well encourage other solicitors to contest the Revenue's treatment of bad debts sustained in connection with advances to clients. In order to measure the value of the Elvy Robb decision from the standpoint of general applicability it is necessary to consider first the facts and decisions in the two earlier cases.

The Hagart & Burn-Murdoch case.

A firm of writers to the signet in Edinburgh made advances without security from time to time over a period of two years to a company in the formation of which they had acted as law agents, and whose regular law agents they became after the company was incorporated. The business concerned was a speculative one, the company failed and the advances proved irrecoverable. The solicitors thereupon wrote off the loan in their profit and loss account, and claimed to deduct it in computing the Sched. D assessment on their profits. It was shown that they had made similar advances to other clients in similar circumstances. The decision of the General Commissioners was in the following simple terms: "The Commissioners, after due consideration of the facts and arguments submitted to them, allowed the appeal."

This verdict was reversed unanimously in both the Court of Session and the House of Lords. The following brief extracts from the judgments appear to sum up the views of their lordships: (i) "It was no part of the employment of the respondents that they should act as bankers and financial agents for their clients. If they chose to lend money to the company they did so as ordinary lenders and not in the discharge of any duty owed to the company by them either as law agents or as factors." (ii) "It is also true that as factors of an estate or for special purposes money may be advanced by writers to the signet under such conditions that its loss would be a proper element in determining the balance of profits and gains, but the facts as found here do not establish any of the special conditions necessary to blend these payments with that of the profession in which the appellants were engaged." (iii) "It is not suggested that any part of the advances . . . consisted of disbursements made in the course of the legal business transacted by the appellants for the company, and nothing that I say must be treated as throwing any doubt on the right of solicitors to a deduction in respect of such disbursements not recovered from the client on whose behalf they were made." (iv) "The Commissioners have found that it is the custom of the respondents to make advances to their clients in connection with the conduct of their legal business. Unfortunately they have made no finding as to the generality and extent of this practice as an ordinary incident of a lawyer's business."

It will be noted that the above observations, while unfavourable in the specific case with which they dealt, none the less laid stress on the importance of the particular facts and conditions in which advances are made by solicitors. Moreover, they left room for the possibility that the decision might have been different if fuller evidence had been submitted and the Commissioners had been thereby enabled to make findings as to the custom of the legal profession generally in regard to advances to or on behalf of clients.

The Rutherford Case.

The appellants were solicitors who carried on a general legal business, which included, in addition to law work, other activities, such as insurance agency, factorial agency and registered stockbroking. It was proved that they also engaged in certain moneylending transactions for the accommodation of particular clients, and although the volume of these advances was not great in relation to their legal practice, it was, none the less, shown that the transactions did form an established part of the general business as habitually carried on by them. Their claim to deduct bad debts resulting from the lending of money to clients was rejected by the General Commissioners, who, although they accepted evidence that "the loans have always arisen directly out of the appellants' general legal (or other) business," found as follows: "The Commissioners, after due consideration of the arguments submitted to them and having regard to the decision in the case of *Commissioners of Inland Revenue* v. *Hagart and Burn-Murdoch* and the observations of the judges therein, refused the appeal, on the ground that the moneys were not wholly and exclusively laid out for the purpose of the appellants' profession within the meaning of r. 3 (*a*) of the Rules applicable to Cases I and II of Sched. D of the Income Tax Act, 1918."

The Court of Session, by a majority of three to one, confirmed the Commissioners' decision. Only Lord Carmont, who dissented, considered that the case could be distinguished from *Hagart and Burn-Murdoch*. On this point he observed: "The present appeal while it does not contain a finding that moneylending is part of the solicitors' business, presents an instance of a composite business of which law agency is a component along with land and house agency, insurance agency, stockbroking and moneylending to clients." The other three judges appear, however, to have been in doubt as to whether or not the Commissioners had actually found that moneylending was an integral part of the appellants' business. Lord Fleming went so far as to say that "in neither case was there a finding of fact that the making of advances was part of the business carried on by the taxpayers."

Here, again, therefore, the form and extent of the evidence brought before the Commissioners and the nature of the findings of fact proved vital, if not, indeed, decisive, factors.

The Elvy Robb appeal.

The facts were that the solicitors had for many years managed the affairs of a lady client, by collecting her income and paying it over to her or on her behalf in accordance with her instructions. In recent years there had been a serious diminution of the income so that there was insufficient to cover the payments made for the account of the client who accordingly became indebted to the firm. In 1933 the solicitors took a second charge from the client to secure the sum of £369 then due. The instrument recited, *inter alia*, that the solicitors had agreed to continue to act for the client only on the condition of the security being given, and it reserved interest although no interest had been charged on the balances due on the open account from time to time. Thereafter the client's income did not revive to the extent anticipated, and when she died in 1940 she owed to the solicitors a further sum of £130 over and above the £369, which was the subject of the charge. Both sums having proved irrecoverable, the solicitors claimed to deduct them in computing their Sched. D assessment, and, on appeal to the General Commissioners, contended that the circumstances were distinguishable from the above two cases on which the Revenue relied. They argued that in both those cases specific advances were intentionally made to clients as such, and that in neither case did the solicitors concerned endeavour to prove any custom or practice of the profession in regard to making advances of that character. They stressed that in their own case the debts arose from a running account in connection with the management of a client's affairs, and that in making payments to or on behalf of a client, which, in some instances, exceeded the receipts on that client's account, they were merely acting in pursuance of a well-recognised professional custom or practice. They called several well-known solicitors, including a member of the Council of The Law Society, to give evidence as to the existence of such a custom or practice.

The Commissioners are reported to have found "that there was a usual practice or custom of solicitors to the effect claimed, and that the debts in question had been incurred in accordance therewith, and were therefore admissible."

It will be noted that the Commissioners did not differentiate between the old debt, i.e., the sum of £369, in respect of which the charge was taken in 1933, and the new debt, representing the further balance accumulated on current account since that date. It might, perhaps, be argued that the former, being secured and subject to interest, had acquired the character of an investment, but the Commissioners appear to have taken the more reasonable view that, having regard to the circumstances in which the old debt had come into being, and had subsequently become secured, there was no legitimate ground for distinguishing it from the new debt.

The particular value of the *Elvy Robb* case is, however, as an illustration of the finding of fact which needs to be sought from the Commissioners. The particular findings in the case are a model of clear and concise statement, and since they involve a point essentially of fact and not of law, it may be assumed that the Revenue would be unlikely to contest the matter further by appeal to the High Court. A Commissioners' decision is not, of course, binding on any other body of Commissioners, and accordingly this case can be treated not as an authority but only as a guide to the kind of evidence to be submitted and the findings to be sought. In view of the well-known universality of the custom of solicitors recognised by the Commissioners in the *Elvy Robb* case, it should not be difficult to obtain similar findings from any other body of Commissioners so long as suitable testimony is given as to custom and practice.

Finally, it is to be noted that the *Elvy Robb* appeal did not cover the whole ground of solicitors' advances; it dealt only with indebtedness arising from advances on account, and in anticipation, of income to be collected; and the appellants made a point of distinguishing the instance where "specific advances were intentionally made as such," as in the *Hagart & Burn-Murdoch* and *Rutherford* cases. It does not, of course, follow from this

that bad debts resulting from such "specific advances" are necessarily inadmissible. On the contrary, since it appears that very many solicitors do frequently make such "specific" advances in the course of their business, it follows that so long as sufficiently convincing testimony to that effect were given it is probable that an appeal on "specific" advances might be equally successful.

A Conveyancer's Diary.

1943. Chancery—1.

THE Law Reports for 1943 contain a certain number of cases of the first importance, all, or almost all, of which are to be found in the Appeal Cases series. Thus, the House of Lords dealt with the doctrine of frustration in *Fibrosa Spolka Akcyjna* v. *Fairbairn, Lawson, Combe, Barbour, Ltd.* [1943] A.C. 32, where *Chandler* v. *Webster* [1904] 1 K.B. 493, was overruled. Again, in *Sovfracht (V/O)* v. *van Udens Scheepvaart en Agentuur Maatschappij (N.V. Gebr.)* [1943] A.C. 203, the House delivered opinions upon the nature of the common law status of an alien enemy which will certainly become classical. (This case can, perhaps, be more satisfactorily cited as *ss. Waalhaven*, the name of the vessel to which it related.) In *Clayton* v. *Ramsden* [1943] A.C. 320, the noble and learned lords considered conditions in wills which provide for defeasance for reasons of religion, and a few weeks later, in *Perrin* v. *Morgan* [1943] A.C. 399, their decision has considerably revised the practice as to the construction of testamentary gifts of "money." Finally, in *Blunt* v. *Blunt* [1943] A.C. 517, the House laid down the principles which are to govern the exercise of the court's discretion in divorce cases, and suggested that there may be fairly frequent cases in which it is proper to exercise the discretion in favour of *both* parties and to grant a decree to both. In all these five cases the House was unanimous, save for a single dissentient on one part of *Clayton* v. *Ramsden*, though there were naturally some differences of emphasis. And in all five the House reversed the decision of the Court of Appeal. It is therefore reasonably safe to say that all five settle matters which had been controversial. As regards frustration, Parliament has since enacted the Law Reform (Frustrated Contracts) Act, 1943, which somewhat modifies the position expounded in the *Fibrosa* case. *Perrin* v. *Morgan* and *Clayton* v. *Ramsden* have already been adequately discussed in this column, and the other three are rather remote from conveyancing.

When one turns to the Chancery Reports, the first point of note is that they have fewer pages than those of any previous year; the 438 pages of 1943 compare with 472 in 1942 and 508 in 1941, which had previously had the fewest. Those of 1941 were, however, in the old wide spacing, and I think probably continue to be the Chancery Reports which contain the least matter. The recent falling off is not mainly due to the war; in the last war there were two volumes of Chancery Reports each year. It is partly due to the modern, and in my opinion entirely laudable, practice of treating will-construction cases as being unreportable. The uncertainties of the future of all property, and especially real property, have induced a certain caution, and the general principles of the law of property are now getting so clearly understood that there are no longer so many matters requiring decision as there were in the years after 1925. My impression is that there are a certain number of cases where litigation is awaiting an armistice in Europe, especially where the litigation is heavy and would take up the time of many people now more usefully occupied. But I do not expect any general revival of Chancery controversies until the satisfactory settlement of the political questions now brewing.

These reflections lead one also to inquire whether any further overhaul of the law of property is necessary from a technical point of view. In the preface to the current (12th) edition of "Wolstenholme," which came out in 1932, the learned editors, one of whom was Sir Benjamin Cherry himself, clearly contemplated that a general Act to amend the 1925 Acts would be necessary in the second half of the nineteen-thirties, though they admitted that the task would not be as formidable as had originally been feared. Looking round now, I can think of a few small points, to which I have generally called attention in this column, but the only substantial matter is the necessity for amending or repealing the Inheritance (Family Provision) Act, 1938. I do not refer, of course, to the great political questions of the day, but to those technical matters of law which give rise to the anomalies and inconveniences struck at by such legislation as the Settled Land Acts, the Trustee Acts, the Law of Property Act and the Administration of Estates Act. I should be much interested to learn if any reader of this column believes that further technical changes are desirable, and I propose to discuss such suggestions here from time to time. In saying that I cannot at the moment see that any substantial technical changes are needed, I may be charged with echoing the Real Property Commissioners of 1829, who stated that our law (at a date before even the Wills Act or the Fines and Recoveries Act) "appears to come almost as near to perfection as can be expected in any human institutions," a remark that is generally taken as a panegyric but may have merely conveyed a pessimistic view of human institutions. However, I do think that the arrangements of 1925 are practical; they are by now pretty well understood, and do not strike the layman as very obscurantist or unreasonable. The Reports for 1943 contain only two decisions on the Inheritance (Family Provision) Act, 1938. I continue to think this Act entirely lamentable, for the reasons stated on several previous occasions, and I suggest that thorough inquiry into its working ought now to be held. Such an inquiry should not only cover the cases where the Act has been invoked in litigation, but also those where it has been the lever to compel a deed of family arrangement, those where its inadequacy has been such that a person with a strong moral claim has been advised that it is useless to pursue it, and those where a malicious testator has evaded it. The committee of inquiry ought to contain not only practitioners, but also some members qualified to explain the systems which obtain elsewhere, especially in the Dominions.

The two cases on this subject are *Re Catmull* [1943] Ch. 262, and *Re Pugh* [1943] Ch. 387. In *Re Catmull* the testator left £725, of which the balance, after meeting duties and expenses, was about £600. He had been married twice. The first wife had five children, all daughters, one of whom was married at the date of the testator's death. The second wife had one child only, a son, who was an infant at the date of the testator's death. The son attained twenty-one and one daughter married after the testator's death and before the summons was heard. The testator made a will during his second marriage by which he gave his whole estate to be equally divided among all his children, except for personal chattels, worth £16, in which he gave his second wife a life interest. She took out a summons under the Act. At the first hearing the case got some distance, but the parties negotiated and agreed on a compromise under which the widow was to get £60 in full satisfaction of her claim. She appears to have repudiated the bargain made by her advisers, which, as it turned out, was unwise of her. The case was then re-argued. In a reserved judgment, Uthwatt, J., held that the word "dependants" in s. 1 (3) of the Act means dependants generally and is not confined to dependants who are before the court. That subsection is the one which provides that the amounts to be awarded are not to exceed two-thirds or a half of the annual income of the estate. The learned judge said that the "subsection defines what may be the subject-matter of orders, and, by inference, how much must remain at the free disposal of testators." Thus if there are five dependants and only one applies, the quantum within which the court can operate is the same as if all five applied. He then went on to decide that where a testator by his will has already distributed among some of his dependants amounts totalling more than the maximum available under s. 1 (3), it is still open to the court on the application of an excluded dependant to make an order in that dependant's favour at the expense of the other dependants. Finally, he considered s. 1 (4), by which it is provided that where the estate is under £2,000 the court can make an order for the application of capital for maintenance "so, however, that the court, in determining the amount of the provision, shall give effect to the principle of the last preceding subsection" (i.e., that which deals with the available proportions). The learned judge held that subs. (4) does not mean that if the estate is under £2,000 the court can make all its calculations in terms of capital: to do so would make very much more available for an applicant where the estate is just under £2,000 than where it is just over that sum. The correct course, he held, is to ascertain the probable income of the estate, whatever it is, then to apply subs. (3), and to decide what amount of income is to be given to the applicants. All those processes are to be exactly the same as if the estate were over £2,000. But, finally, if the estate is under £2,000, the court may capitalise the annuity which it would order to be paid and direct instead the payment of the capitalised sum. It does not appear to be explained how this scheme would work in the case of payments to a widow or to an unmarried daughter, both of which are terminable on the actuarially incalculable event of marriage, and like considerations apply to a "disabled" dependant.

Applying these findings of law, the learned judge held that the estate was likely to produce an annual income of £19 10s., that being 3½ per cent. of £600. It is not clear on what footing the 3½ per cent. was fixed. Two-thirds of that, i.e., £13 per annum, was available for the court to dispose of under the Act, since there were other dependants as well as a widow; and as the estate was under £2,000, the resultant annuity could be capitalised. The court then heard argument on the merits. It appeared that by reason of contributions compulsorily made in the testator's life the widow would get a State pension of 10s. a week, capable of being increased, under recent legislation, up to 22s. 6d. in case of need. All parties were working people, and the widow was in receipt of the amount which the State has thought proper to provide for the widows of working men. That being so, the testator was "properly free, consistently with the object of the Act, to dispose of the whole of his estate by dividing it among his children." Consequently, the learned judge made no order in favour of the widow. The order as to costs was rather unusual: all parties except the widow were to have theirs out of the estate; she was to have out of the estate her costs up to the date of the original hearing, and her whole costs as between solicitor and client if she did not appeal.

In *Re Pugh* the testator was a farmer. The applicant was his widow, who had been his third wife and had married him two

and a half years before his death when he was seventy-five. She had previously been his housekeeper. He left her his whole residue, which was worth about £1,800, but left his farm, worth about £5,000, to a grandson. The grandson was the son of one of the testator's sons who had materially contributed to the prosperity of the farm. There was no evidence that the widow had so contributed. She applied under the Act, being the sole "dependant." The first question was as to the basis on which the one-half of income, available under s. 1 (3), was to be calculated having regard to the fact that the only dispositions were of corpus. An effort was made to argue against the widow that the proper thing to do was to find out what was one-half of the actual total income of the estate, then to find *what annuity* could be bought by her with the corpus given her, and that the further amount which could be given would be the difference between those figures. This suggestion was alleged to follow from *Re Catmull*. Morton, J., in a reserved judgment, held that the calculations to be made under s. 1 (3) are simple calculations of proportions of the actual income, but that the fact that the applicant is getting capital is to be taken into account in assessing what more she is to be given, if anything. On the merits, an affidavit of the widow was tendered, strongly suggesting that just before his death the testator had thought of making more provision for her. Morton, J., held this statement inadmissible under s. 1 (7), which enables extrinsic evidence to be tendered as to the testator's reasons for not making further provision for the applicant. The learned judge said that it might well be that the testator hesitated too long in amending his will, but that the language of s. 1 (7) could not be stretched far enough to admit this evidence.

The learned judge then stated that if he had himself been sitting in the testator's armchair "I should have made slightly more provision for the widow than the testator made." But he recalled his own words in *Re Styler* [1942] Ch. 387, where he said that the court should not interfere unless the will was unreasonable. This widow had very little other means, it was true. But she had been married to the testator for a very short while, and she was getting the whole residue of £1,800. It was doubtful whether, if she were offered the choice between £1,800 and an annuity of £119, which was half the income of the estate, she would have chosen the latter. This will was not unreasonable and could not be interfered with. But the learned judge said that he was not inclined to saddle the widow with the costs of all parties, and therefore, though she had failed, made no order as to costs.

Landlord and Tenant Notebook.

Effect of Unauthorised Alienation.

MORE than one text-book contains a statement in the following or similar terms: "the lessee of property can, in the absence of agreement restricting his right, underlet it for any period less than the residue of his own term" or "a lessee or tenant for years, who is not restrained by his lease from sub-letting, may demise for any less term than he himself has," etc. These statements are correct as far as they go; that is to say, they correctly express the limits of the lessee's rights against his lessor; but they may be responsible for the notion that an assignment or sub-letting in breach of covenant is null and void. I believe, as I shall show in my next article, that this notion may have been cherished, *i.a.*, by the draftsmen of para. (*a*) and para. (*d*) of Sched. I to the Rent, etc. Restrictions (Amendment) Act, 1933, or at all events, those of the latter's predecessor, para. (*h*) of s. 5 (1) of the Increase of Rent, etc., Act, 1920, as amended by s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923.

In the case of assignments of the term it was, indeed, at one time held, in *Paul* v. *Nurse* (1828), 8 B. & C. 486, that, in the absence of consent required by a lease, such assignment was void; but *Williams* v. *Earle* (1868), L.R. 3 Q.B. 739, has since decided that such a transaction duly vests the term in the assignee. The case is best known as authority for the proposition that a covenant against alienation runs with the land; the first assignee of a lease of some ironworks, to whom the grantee had assigned with the consent required by the lease, assigned without such consent to a gentleman described in the findings of fact as the editor of the *Cricketers' News*, and in the judgment of Blackburn, J., as "selected because he had nothing to lose." The learned judge held that the assignment was nevertheless operative; as regards sundry breaches of repairing covenants, etc., the plaintiff's remedy on those covenants was against the second assignee; but he could recover against the assignor indirectly in respect of his allegations that the premises "had come into the possession of a person unable to pay the rent, and had become less valuable."

The validity as between the parties of an unauthorised underletting is, perhaps, more easy to establish, for all one has to do is to refer to the law of estoppel. But difficulty has been met with in working out the implications of the position, e.g., in *Parker* v. *Jones* [1910] 2 K.B. 34. In that case it appeared that a house and field had been let on a yearly tenancy which commenced in 1896, the agreement prohibiting sub-letting without consent, and also containing a forfeiture clause operative on the breach of any covenant. The tenant sub-let the field to the plaintiff, also on a yearly tenancy, in 1899; his landlord was not informed, and remained unaware of the sub-letting until 1909, soon after he had innocently accepted a surrender of the head tenancy and equally innocently let the premises to the defendant. The plaintiff having refused to give up possession, the defendant brought matters to a head by turning his (the plaintiff's) stock out on to the road, and in the ensuing action the county court judge took the view that the plaintiff was in the wrong as he had had constructive notice of the covenants in the head lease, and that, consequently, as against the head lessor his possession was wrongful. The Divisional Court set this judgment aside. The plaintiff's term, it was held, was not affected by the surrender, and still subsisted at the time of the alleged trespass.

A point raised, but not decided, in the course of the above case was this: in answer to an argument that if the plaintiff's rights depended on waiver of the head lessor's right of forfeiture there was no such waiver (owing to ignorance), it was contended that no right of re-entry could be exercised after the surrender had been accepted. This seems plausible, but Darling, J., expressed the opinion that if the question had arisen between the head lessor and the plaintiff the former would have been entitled, notwithstanding the surrender, to treat the latter as a trespasser. This is a provocative dictum, and, while at first sight it is difficult to see how a term can be brought to an end twice (and if the sub-tenant is to be a trespasser, the head lease must be determined) it is perhaps right to recall that metaphysical considerations rather than physical limitations are apt to govern questions which are at least of a similar nature. Thus, a lease which has been forfeited for non-payment of rent may be "revived" under the Common Law Procedure Act, 1852, s. 212, and the tenant "hold and enjoy the demised lands, according to the lease thereof made, without any new lease."

Parker v. *Jones* appears to have been misunderstood by the county court judge who tried *Commissioners of Works* v. *Hull* [1922] 1 K.B. 205, in which proceedings in ejectment were taken against an assignee, the assignment being in breach of covenant and condition. At first instance *Parker* v. *Jones* was treated as implying that the defendant was not a trespasser, but this ignored the difference between forfeiture and surrender.

It is, no doubt, right to say that most tenancy agreements and leases contain comprehensive provisoes for re-entry (though I was surprised to find, some time ago, that those used in a certain block of flats in London conferred no such power on the lessors) and it must be rare for breaches of covenants against alienation to occur unnoticed by the covenantees. Since L.P.A., 1925, came into force, relief may be sought against forfeiture for this cause, but terms may of course be imposed which will result in something being done to safeguard the position of the landlord.

The sub-tenant of controlled premises is, however, in a privileged position. *Prima facie*, it is a matter of indifference to him not only whether, but also how, the mesne tenant's interest comes to an end; and there is at least an apparent conflict between provisions which ensure that on that determination he is to hold direct of the former head lessor and enjoy the same protection as before, and provisions designed to give the said landlord a right to possession (subject to the consideration of reasonableness) on breach of covenant by his tenant; or on his tenant sub-letting the whole of the premises without his consent (whether the tenancy agreement prohibits alienation or not). I propose to examine this apparent conflict next week.

Obituary.

SIR JOHN MOXON, O.B.E.

Sir John Moxon, O.B.E., solicitor, of Messrs. Moxon & Petty, solicitors, of Newport, Mon, died recently, aged seventy-nine. He was admitted in 1887, and received the honour of knighthood in 1938. He was chiefly responsible for many important improvement schemes in Newport.

MR. H. WARINGTON SMYTH.

Mr. H. Warington Smyth, C.M.G., mining engineer and barrister-at-law, died on Sunday, 19th December, aged seventy-six. He was called by the Inner Temple in 1899. He had a distinguished career in Siam and South Africa, and was a fine yachtsman, who served in the R.N.V.R. in this war and the last. He wrote many books of reminiscences, which he also illustrated, among which may be mentioned "Mast and Sail in Europe and Asia," and "Sea-Wake and Jungle Trail."

MR. H. B. CARSLAKE.

Mr. Hugh Barham Carslake, solicitor, of Messrs. Ryland, Martineau & Co., solicitors, of Birmingham, died on Saturday, 18th December. He was admitted in 1899, and had been president of the Birmingham Law Society.

MR. T. W. HOLDICH.

Mr. Thomas White Holdich, solicitor, of Messrs. Thos. W. Holdich & Son, solicitors, of Hull, died on Wednesday, 15th December, aged eighty-two. He was admitted in 1884, and had been hon. secretary and president of the Hull Law Society.

To-day and Yesterday.

LEGAL CALENDAR.

December 27.—On the 27th December, 1774, the Recorder of London made his report to the King on the convicts in Newgate under sentence of death. Seven of them were respited, but six were ordered for execution: Amos Merret, who had broken into a house at Hornsey and stolen a large quantity of plate; John Williams, who had stolen money and banknotes to the amount of over £70 from the "Bunch of Grapes" by the Tower; Richard Mitchell, a General Post Office sorter, who had stolen a £100 banknote from a letter; Edward Parker, William Pritchard and Peter Shaw, who had committed a burglary and stolen £40 worth of plate.

December 28.—The most famous court martial in British naval history, that of Admiral Byng, opened on board the *St. George*, at Spithead, on the 28th December, 1756. War with France had broken out and Byng had been sent to the Mediterranean with instructions that in the event of an attack on Minorca, which had been a British possession since 1713, he was to use all possible means in his power for its relief. When he reached Gibraltar he was informed that the enemy had overrun the island and laid siege to Fort St. Philip. Off Port Mahon he fell in with a French squadron, somewhat stronger than his own, with which he fought an inconclusive action, suffering some loss and eventually withdrawing, leaving Minorca to its fate. Public indignation was excessive and he was arrested immediately on his return to England. The court found that he had not done his utmost to relieve Fort St. Philip or to take, seize and destroy the enemy's ships; it adjudged him to fall within the 12th article of war and accordingly had no alternative but to pronounce sentence of death, though it added a strong recommendation to mercy on the ground that his misconduct did not arise either from cowardice or disaffection. Nevertheless, the sentence was carried out.

December 29.—On the 29th December, 1916, Mr. Gordon Hewart, K.C., lately appointed Solicitor-General, received the honour of knighthood at Buckingham Palace. Three years later he became Attorney-General. When he was chosen to be a Law Officer of the Crown he had been only four years a leader and three years a Member of Parliament, but by his brilliant intelligence, his shrewdness and solid judgment and his acute political sense, he rendered the Government conspicuous service in difficult times. In 1922 he became Lord Chief Justice of England and was raised to the peerage. On his retirement in 1940 a Viscounty was conferred on him. His memory in the office he filled will always be linked with his bold and outspoken stand against the encroachments of bureaucratic despotism on the law-established rights and liberties of Englishmen.

December 30.—On the 30th December, 1851, when one of the gangs of convicts returned to dinner on board the hulk *Warrior*, at Woolwich, they rushed down and took possession of two of the decks, defying the guards or the military to come near them. Eventually a party of marines with drawn cutlasses went below and disarmed the mutineers, thirty-eight of the most violent being heavily ironed. Seven were flogged as an example.

December 31.—On the 31st December, 1842, there was an odd scene at the Guildhall Police Court when a Miss Newell, an eccentric whom Dickens might have invented, attended for the purpose of urging her claim to the sovereignty of England, on which subject she asserted that she had received a Divine revelation. She bade the court farewell, shaking hands with Sir Chapman Marshall, the presiding magistrate, to whom she remarked: "Pardon me if I take leave of you in the words of the good old song 'Adieu, thou dreary pile.'"

January 1.—In 1871 Clement's Inn, near St. Clement Danes, was still an Inn of Chancery, and young Frank Lockwood, then reading for the Bar, took a set of chambers there. A score of years after, he recalled a New Year's Day there when "a knock came at the door and the head of the porter of Clement's Inn presented itself to me. It was the 1st January, and he gravely gave me an orange and a lemon. He had a basketful on his arm. I asked for some explanation. The only information forthcoming was that from time immemorial every tenant on New Year's Day was presented with an orange and a lemon, and that every tenant was expected to give half a crown to the porter. Further inquiries from the steward gave me this explanation, that in old days, when the river was not used merely as a sewer, the fruit was brought up in barges and boats to the steps from below the bridge and carried by porters through the Inn to Clare Market. Toll was at first charged, and this was divided among the tenants whose convenience was interfered with; hence the old lines beginning 'Oranges and lemons, said the bells of St. Clement's.'"

January 2.—On the 2nd January, 1810, Charles Lamb wrote to his friend Manning: "I am now in chambers, No. 4 Inner Temple Lane . . . I have two sitting-rooms. I call them so *par excellence*, for you may stand, or loll, or lean, or try any posture in them; but they are best for sitting . . . I have two of these rooms on the third floor, and five sleeping, cooking, etc., rooms, on the fourth floor . . . My best room commands a court in which there are trees and a pump, the water of which is excellent —cold with brandy and not very insipid without. Here I hope to set up my rest, and not quit till Mr. Powell, the undertaker, gives me notice that I may have possession of my last lodging. He lets lodgings for single gentlemen." Lamb's rent was £30 a year.

THE FIRST LORD CAMDEN.

The recent death of the Marquess of Camden once again recalls how much of the peerage has a legal origin, for his ancestor was that Lord Camden whose father was Chief Justice of the King's Bench, and who himself held the offices of Attorney-General, Chief Justice of the Common Pleas and Lord High Chancellor. It was while he was Attorney-General that the accession of George III brought Lord Bute and the Tories to power, and he, a Whig, was raised to the Bench to remove him from the political arena. "I am a figure put into that niche in the halls and am never to leave it," he said. And again he declared that he was an old family picture out of fashion and carried upstairs by force into the garret. But it was not to be. Very soon the great case of John Wilkes and the question of the legality of arrest under a general warrant gave him the occasion to make constitutional history in the fullest sense, putting an end to such arbitrary practices. Of his judgment a friend wrote to his nephew at Cambridge: "Your academical conceit will be disappointed. There are no flowers in it. No Tulley, No Demosthenes. It is very sound law—but as dry as a bone!" In 1766 the Great Seal was placed in his hands and he made, if not a brilliant, certainly an upright and industrious Chancellor. Before his death he began building on land he owned to the north of London, which developed into Camden Town. In 1791 Walpole wrote: "There will soon be one street from London to Brentford; ay and from London to every village ten miles around. Lord Camden has just let ground for building 1,400 houses, nor do I wonder; London is, I am certain, much fuller than ever I saw it." One gravity-removing adventure is recorded of him while he was Chief Justice. Staying with Lord Dacre in Essex, he one day took a walk to the top of a hill where the parish stocks stood. Out of curiosity he asked the friend accompanying him to fasten him into them that he might sample the punishment. The friend was absent-minded and sauntered off with a book, only recollecting after he had returned to the house, where he had left the Chief Justice. Meanwhile the judge had appealed to a passing rustic to release him, but only got a grin and the answer: "No, no, old gentleman; you wasn't set there for nothing."

Correspondence.

[The views expressed by our correspondents are not necessarily those of THE SOLICITORS' JOURNAL.*]*

Husband's Rights.

Sir,—Will you allow us to correct a mis-statement which appears in the "Notes and News" of your issue dated 18th December, regarding a recent decision of the Tonbridge magistrates.

Our Mr. Jevons represented the defendant in this case, and it is not correct that the Tonbridge magistrates held that a husband has an absolute right of deciding who should or who should not come into his own house, nor is it correct that the magistrates dismissed the wife's application on those grounds.

The magistrates dismissed the charge based on persistent cruelty on the grounds that the complainant's evidence did not disclose persistent cruelty. They dismissed the charge of failing to provide maintenance on the ground that there had been no such failure, maintenance at an adequate rate having been paid up to a period some weeks after the issue of the summons and expiring only a day or two before the hearing.

In the course of the hearing, however, and by way of explanation of certain trouble which had arisen between the husband and wife, it was necessary to point out that the husband had requested the wife not to have her relatives at the house, but that she had defied the husband's wishes in this respect. Our Mr. Jevons submitted that under the circumstances of this case the husband was within his rights in refusing to have his wife's people in his house. It was in the course of this submission that he referred in general terms to a husband's prerogative regarding the people who entered his house, but it was not necessary for the magistrates to decide, in connection with this case, whether a husband had an absolute right regarding the people who entered his house or not, and they certainly never came to any such decision.

There has been such an amount of paper and ink devoted to the reporting of this case and to the journalistic deduction of the meaning to be inferred from the dismissal of the summons against our client that we felt that a misapprehension as to the true position should be corrected in a professional paper.

Tonbridge. F. B. JEVONS & RILEY.
20th December, 1943.

Hereford Council and H.M. Judges.

Sir,—The Council's resolution reported in *The Times* of 17th December, and the speech of Mr. Cyril Franklin in support,

raise important constitutional questions which it is desirable to have settled.

The resolution alleges "mis-statements" from the Judicial Bench "which had besmirched the City."

Mr. Franklin in his speech referred to "the deplorable picture of what could happen in Divisional Courts," alleged "lamentable neglect of the rules of justice" and "gross ignorance of procedure" and "grave blunders and deplorable proceedings" in the High Court.

He enquired what should be said "about the grievous peril of being under the lamentable Bench of High Court Judges, to unseat whom no steps had been taken," finally urging "disciplinary action."

On this arise the following constitutional points.

The Council's resolution asks the Watch Committee to "consider approaching the Home Secretary." His Majesty's Ministers, however, have no right to make representations to His Majesty's Judges. That power by our constitution is reserved to Parliament itself (Supreme Court Act, 1925, s. 12 (1)).

"*Prima facie*," as no doubt the Council and Mr. Franklin would recognise, the resolution and the speech are "Contempt of court" as "scandalising the court itself" or "calculated to lower judicial authority" (*Rex* v. *Gray* [1900] 2 Q.B., and *Rex* v. *New Statesman* (1928), 44 T.L.R.).

The matter can hardly be allowed to rest where it stands at present.

London, E.C.2. CHARLES L. NORDON.
20th December, 1943.

Rules and Orders.

S.R. & O., 1943, No. 1727/L.38.

COURTS (EMERGENCY POWERS), ENGLAND.

THE COURTS (EMERGENCY POWERS) (AMENDMENT NO. 2) RULES, 1943.

DATED DECEMBER 15, 1943.

I, John Viscount Simon, Lord High Chancellor of Great Britain, in exercise of the powers conferred upon me by section 7 of the Courts (Emergency Powers) Act, 1943, section 17 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, Regulation 7 of the Defence (Evacuated Areas) Regulations, 1940,* and of all other powers enabling me in this behalf, do hereby make the following Rules:—

1. The following Rules shall be substituted for Rules 2, 14 and 27, respectively, of the Courts (Emergency Powers) Rules, 1943†:—

"2. *Judgments.*]—The appropriate court for the giving of leave to proceed to the enforcement of a judgment shall be—

(*a*) the court in which the judgment is to be obtained or has been obtained; or

(*b*) if the judgment has been obtained in a county court and is to be enforced in another county court, either of those courts; or

(*c*) if the judgment has been obtained in a court outside England and Wales and is registered in a court in England or Wales for the purpose of enforcement, the court in which the judgment is registered."

"14. *Check on issue of judgment summons.*]—(1) Any application for the issue of a judgment summons to enforce a judgment shall be accompanied by a statement showing either—

(*a*) that leave to proceed has been given in respect of the judgment; or

(*b*) that the judgment is one to which section 2 applies and that no direction has been given by the court under subsection (1) of that section; or

(*c*) that the judgment is one to which neither section 1 nor section 2 of the Act applies.

(2) No order of commitment and no instalment order shall be made on the hearing of a judgment summons, unless the court is satisfied that the judgment creditor was entitled to the issue of a judgment summons under paragraph (1) of this Rule."

"27. *Check on issue of execution or judgment summons.*]—(1) No warrant of execution or possession or delivery shall be issued to enforce any judgment unless the party desiring to enforce the judgment files in the court office a praecipe showing either that leave to proceed has been given or that the judgment is one to which neither section 1 nor section 2 of the Act applies.

(2) No judgment summons shall be issued to enforce any judgment unless the party desiring to enforce the judgment files in the court office a praecipe showing either—

(*a*) that leave to proceed has been given; or

(*b*) that the judgment is one to which section 2 of the Act applies and that no direction has been given by the court under subsection (1) of that section; or

(*c*) that the judgment is one to which neither section 1 nor section 2 of the Act applies.

(3) No order of commitment and no instalment order shall be made on the hearing of a judgment summons unless the judge is satisfied that the judgment creditor was entitled to the issue of a judgment summons under paragraph (2) of this Rule."

2. These Rules may be cited as the Courts (Emergency Powers) (Amendment No. 2) Rules, 1943, and shall come into operation on the 1st day of January, 1944.

Dated the 15th day of December, 1943. *Simon*, C.

* S.R. & O. 1940 (No. 1209) II, p. 192. † S.R. & O. 1943 No. 1113.

Notes of Cases.

HOUSE OF LORDS.

Cadzow Coal Co., Ltd. *v.* Price;
Cadzow Coal Co., Ltd. *v.* Murphy.

Viscount Simon, L.C., Lord Thankerton, Lord Russell of Killowen, Lord Macmillan and Lord Wright. 7th December, 1943.

Master and servant—Workmen's Compensation—Fire damp explosion injuring workman—No evidence as to cause of explosion—"Accident arising out of and in the course of his employment"—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 1.

Appeal from the Court of Session.

The facts in these two appeals, which had been consolidated, were the same. P., the respondent in the first appeal, was employed by the appellant company in their mine. He and M., the respondent in the second appeal, who was also employed by the company, were preparing the coal-cutting machine for its work when an explosion occurred which inflicted burns on P. and M. which had totally incapacitated them. The explosion was caused by the ignition of fire damp in the mine. No other miners were at the time sufficiently near the explosion to have been responsible for the ignition. There was no evidence that either of the respondents had anything to do with the explosion nor was there any evidence as to how the heating occurred which caused the explosion. In these circumstances the Sheriff-Substitute held the respondents had not respectively discharged the onus of proof that the accident arose out of their employment. The Court of Session reversed his conclusion. The company appealed.

VISCOUNT SIMON, L.C., said that it was quite correct to say that an injured workman, claiming compensation under the Workmen's Compensation Acts, must prove that the accident arose out of and in the course of his employment, but that was an entirely different thing from saying that the workman could not recover unless he could show affirmatively how the accident happened. The Lord Justice Clerk was justified in observing that it was a matter of judicial knowledge that the risk of such an explosion was notoriously a risk inherent in the employment of getting coal underground. There was a long list of cases which showed that a workman's accident should be regarded as "arising out of his employment" if the risk of such accident was one to which his occupation was especially exposed (*Challis* v. *London and South Western Railway Company* [1905], 2 K.B. 154; *Trim School* v. *Kelly* [1914] A.C. 667; *Dennis* v. *White* [1917] A.C. 479; *Dover Navigation Company* v. *Craig* [1940] A.C. 190). The fallacy in the other view was to suppose that the claimant did not prove that the accident arose out of his employment, unless he proved affirmatively exactly how the said risk to which he was exposed came to operate. In the present case, inasmuch as the risk of explosion in the mine was a risk inherent in the employment of the respondent, he satisfied the requirement that he must prove that the accident arose out of his employment by proving the accident arose out of an explosion. Those who maintained the other view seemed to assert that, if an accident was due to the serious and wilful misconduct of the workman, it could not be an accident arising out of the employment. If the language of s. 1 were examined, it was at once seen that "serious and wilful misconduct" was a bar to the remedy otherwise open to an injured workman. It was not introduced for the purpose of narrowing the conception of the accident in respect of which a claim might be made. In the case of serious and permanent disablement the defence of "serious and wilful misconduct" was not open to the employer and compensation must be paid notwithstanding the workman's misconduct. No compensation was ever awarded unless the accident arose out of the employment. The appeal should be dismissed.

The other noble and learned lords agreed in dismissing the appeal.

COUNSEL: *Blades*, K.C. and *F. Watt*; *Duffes*, K.C., and *James Walker*.

SOLICITORS: *Beveridge & Co.*, for *W. & J. Burns, W.S.*, Edinburgh, and *J. A. McAra*, Glasgow; *Kingsford, Dorman & Co.*, for *Allan McDougall and Co.*, S.S.C., Edinburgh; and *R. Maguire, Cook & Co.*, Glasgow.

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

COURT OF APPEAL.

J. Leavey & Co., Ltd. *v.* G. H. Hurst & Co., Ltd.

Lord Greene, M.R., and MacKinnon and du Parcq, L.JJ. 25th and 26th October, 1943.

Contract—Sale of goods—Non-delivery—Frustration—Unforeseen circumstances excepted—Limitation of Supplies Order, 1941 (*S.R. & O., No.* 323). *Practice and procedure—Amendment of pleadings at the hearing.*

Plaintiffs' appeal from a judgment of Cassels, J., in an action for alleged breach of contract by the defendants to deliver goods.

The defendants pleaded the defence that the coming into operation of the Limitation of Supplies Order, 1941 (S.R. & O., No. 323), made it illegal and therefore impossible for the defendants to fulfil their contract and deliver the goods. Two new points not pleaded were set up by the defendants at the trial. One was that the exception of "unforeseen circumstances" in the contract applied, and the other was that of frustration. The learned judge found in favour of the defendants on both of these issues and also decided that the damages were merely nominal.

LORD GREENE, M.R., said that he had said more than once in the Court of Appeal that where a substantial departure from the pleadings was desired to be made, it was the duty of the judge to see that a proper application was made to him for leave to amend the pleading at the trial. The proposed amendment should be put in writing, so that counsel on the other side can consider it and, if necessary, apply for an adjournment. It would be seen at once what grave possibilities of injustice there were if pleadings were brushed aside at the trial. New issues were raised which had never been pleaded,

and evidence called bearing on those issues with regard to which there had been no discovery and which the other side had no opportunity of meeting by other evidence. In the present circumstances, no real harm would be done by allowing the amendment in the Court of Appeal, as no request had been made for an adjournment. His lordship found that in the present case he agreed with the learned judge that on the true construction of the contract the phrase "unforeseen circumstances" in its context referred to circumstances making the performance of the contract impossible (*George Wills & Sons, Ltd.* v. *R. S. Cunningham, Son & Co., Ltd.* [1924] 2 K.B. 220). The clause in the present case did no more than the doctrine of frustration would have done if applicable. The order on its face could not make it impossible for this contract to be performed after the end of September, 1941. The delivery provision in the contract was "delivery as ready after June, 1941." Another view making the doctrine of frustration inapplicable was that the Limitation of Supplies Order in question provided that the quota fixed for the manufacturer might be departed from by licence granted by the Board of Trade. The contract could therefore only become frustrated, not by the mere making of the order, but by failure within a reasonable time to obtain the necessary licence. The defendants could have asked the plaintiffs to obtain the necessary licence, and the plaintiffs were in a good position to obtain the licence because their stock had been destroyed by enemy action. The plaintiffs did in fact obtain a licence, which was sent to the defendants on 9th October, 1941, but the defendants refused to take advantage of it. The learned judge had held that as there was no market in which the plaintiffs could obtain substituted goods, the damages were merely nominal. That was not correct. In his lordship's view, the correct way of reaching the figure of damage was by estimating the profits which the plaintiffs would have made by making the goods up into overcoats and selling them. The figure arrived at in this way by the learned judge was £525, and it was not now contended that that was wrong. The appeal would be allowed.

MACKINNON and DU PARCQ, L.JJ., agreed.

COUNSEL: *J. Lynskey*, K.C., and *Astell Burt*; *A. J. Denning*, K.C., and *P. B. Morle*.

SOLICITORS: *H. B. Wedlake, Saint & Co.*; *Jaques & Co.*, for *Scholefield, Taylor & Maggs*, Batley.

[Reported by MAURICE SHARE, Esq., Barrister-at-Law.]

CHANCERY DIVISION.

In re **Burrows**; *Ex parte* **the Official Receiver** *v.* **Steel.**

Morton and Cohen, JJ. 1st November, 1943.

Bankruptcy—Relation back—Debtor absents himself with intent to delay creditors—Five months later bankruptcy petition presented—Continuing act of bankruptcy—Relation back of title of trustee—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *ss.* 1 (1) (*d*), 4 (1), 37 (1).

Appeal from Norwich County Court.

The Bankruptcy Act, 1914, provides s. 1 (1): "A debtor commits an act of bankruptcy . . . (*d*) if with intent to defeat or delay his creditors he does any of the following things, namely: . . . departs from his dwelling-house, or otherwise absents himself, . . ." Section 4 (1) (c) provides: "A creditor shall not be entitled to present a bankruptcy petition against a debtor unless . . . (*c*) the act of bankruptcy on which the petition is grounded has occurred within three months before the presentation of the petition . . ." Section 37 provides: "The bankruptcy of a debtor . . . shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition . . ." On the 1st May, 1942, the debtor departed from his dwelling-house with intent to defeat or delay his creditors and continued to absent himself. On the 20th October, 1942, a bankruptcy petition was presented against him and a receiving order was made on the 1st December, 1942, the debtor being adjudicated bankrupt on the 23rd January, 1943. On motion by the Official Receiver, as the trustee in bankruptcy, the learned county court judge held that the title of the trustee could not relate back further than three months before the date of the presentation of the petition. The trustee appealed.

MORTON, J., said, in view of s. 4 (1) (c), the Official Receiver could not rely on any act of bankruptcy which occurred more than three months before the presentation of the petition. That being so, he could not rely on an earlier act than the "absence" which was occurring just within three months before the presentation of the petition. It was clear that, where there was more than one act of bankruptcy, the trustee's title could not relate back to an earlier date than three months preceding the date of the presentation of the petition; yet, if the arguments for the trustee were right, in the case of a single continuing act of bankruptcy, the title of the trustee could relate back to a period which might be ten, twelve or thirty years or more before the date of the presentation of the petition. Further, the trustee's title would relate back under the earlier portion of s. 37 to a very remote period, while under the later portion it would not relate back to a date earlier than three months before the presentation of the petition. The policy of the Legislature seemed to have been to reduce the period of relation back. The receiving order might have been more happily expressed; it must be read as stating an act of bankruptcy which would be a good ground for the making of a receiving order, that was to say, an act of bankruptcy which occurred within the relevant period. The appeal must be dismissed.

COHEN, J., agreed.

COUNSEL: *V. R. Aronson*; *W. A. L. Raeburn*.

SOLICITORS: *Butt & Bowyer*, for *Daynes, Keynes & Durrant*, Norwich; *Vizard, Oldham, Crowder & Cash*, for *Mills & Reeve*, Norwich.

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

Practice Note.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Lord Atkin, Lord Porter and Sir George Rankin. 1st November, 1943.

Practice—Production of documents—Forgery alleged—Originals must be before the court.

On an appeal from India in which the genuineness of an alleged will was in issue, the original will was not produced before the Board, Lord Atkin said: How can any court determine a question of forgery of a will without seeing the will? It ought to be borne in mind that when there is a question arising before this Board as to the genuineness of a document, the original document ought to be produced to their lordships. The practitioners who have to deal with the matter are at fault in not seeing that the document is produced to the Board. There was no reason why their lordships should be so hampered in dealing with a question of fact, and they reserved to themselves the possibility of saying, after hearing the judgments and the description of the will, if any real question arose, that they would adjourn the case in order that the will should be produced. He did not know whether their lordships could make a rule of the Privy Council that it should be so, but they intimated that it ought to be an invariable rule of practice, where there is a real doubt as to the genuineness of a document, that the original document, or a photostat copy should be before the Board. It sometimes happened that an official document was in constant use, but as a general rule the original ought to be produced, and there ought to be no difficulty in getting a photostat copy. Their lordships had no doubt that on application to the High Court, that court would make any order which was necessary for the production of the document.

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

War Legislation.

STATUTORY RULES AND ORDERS, 1943.

No. 1705. **Aliens.** Protected Areas (No. 3) Order, Dec. 11.

No. 1727. **Courts** (Emergency Powers) England (Amendments No. 2) Rules, Dec. 15.

No. 1716. **Customs Exportation.** Revocation of Licences Order, Dec. 15, revoking Licences *re* Machetes.

No. 1711. **Excess Profits Tax.** The Relief from Double Excess Profits Tax (Northern Rhodesia) Declaration, Order in Council, Dec. 10.

E.P. 1731. **Food** (Fish) (G.B.) General Licence, Dec. 17, under the Fish (Supplies to Catering Establishments) Order, 1943.

No. 1708. **National Registration Amendment** (No. 2) Regulations, Dec. 11.

E.P. 1702. **Nurses' Indoor Uniforms.** The Making of Civilian Clothing (Restrictions) (No. 18) Order, Dec. 15.

No. 1703. **Re-conditioned Service Clothing** (No. 2) Order, Dec. 15.

No. 1712. **Record Office, England.** Documents of the Ministry of Town and Country Planning. Order in Council, Dec. 10, approving Additional Rule extending the Rules for the Disposal of Valueless Documents to the Ministry of Town and Country Planning.

No. 1713. **Welsh Church.** Order in Council, Dec. 10, continuing the Powers of the Commissioners of Church Temporalities in Wales until Dec. 31, 1944.

Notes and News.

Notes.

Serjeant A. M. Sullivan, K.C., has been appointed Treasurer of the Middle Temple for the year 1944.

On the 17th December last Mr. Dallas Young, M.B.E., on his retirement after forty years in the Admiralty Registry, was presented with an address bearing the signatures of thirty solicitors, and a cheque for over £100. The presentation took place in the Admiralty Reference Room, and was on behalf of the solicitors in London practising in the Admiralty Division.

The annual general meeting of the Bar will be held in the Old Hall, Lincoln's Inn, on Tuesday, 18th January, 1944, at 3 o'clock. The Attorney-General will preside. Any member of the Bar is at liberty to bring forward for discussion at the meeting any resolution, provided that notice thereof is given in writing to the Secretary of the Council not later than noon on Tuesday, 11th January, and that in the opinion of the Executive Committee of the Council such resolution is a matter of general interest to the Bar.

Wills and Bequests.

Mr. William Robert Bousfield, K.C., F.R.S., of Ottery St. Mary, Devon, left £43,688, with net personalty £40,705.

Mr. William Arthur Clarke, solicitor, of Leicester, left £33,805, with net personalty £29,258.

Mr. Leonard Morgan May, F.S.A., barrister-at-law, of Blackheath and Lincoln's Inn, left £77,235, with net personalty £75,640.

Mr. Cecil Henry Oliverson, barrister-at-law, left (unsettled estate) £180,489 with net personalty £174,951.